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No. 95-1415

FILED
APR 29 1996
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

KATHERINE SABELKO and NANCY BARTO,
Petitioners,

v.

THE CITY OF PHOENIX, SKIP RIMSZA, in his official capacity as Mayor of the City of Phoenix, and THELDA WILLIAMS, FRANCES EMMA BARWOOD, CRAIG TRIBKEN, JOHN NELSON, KATHY DUBS, SALOMON F. LEIJA, and CALVIN C. GOODE, in their official capacity as members of the City of Phoenix City Council,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. INTRODUCTION

The Ordinance at issue allows a hostile audience to veto speech in a public forum by invoking a personal, speech-free "bubble." On March 18, 1996, this Court granted certiorari in *Schenck v. Pro-Choice Network of Western New York*, No. 95-1065, a case involving a substantially similar personal, speech-free "bubble" restriction contained in an *injunction*. 95-1065 Pet. App. A-13. The case at bar addresses a "bubble" *ordinance*. At least thirty-five Arizona and California cities have enacted, or intend to enact, "bubble" ordinances (depending on the outcome of this case). Pet. App. 98a-99a. This Court held a similar "consent" provision unconstitutional in *Madsen v. Women's Health Center, Inc.*, 114 S.Ct. 2516, 2529 (1994). However, the divided Ninth Circuit decision below distinguished *Madsen* as limited to injunctions and refused to invalidate the same restriction when implemented as an ordinance. Pet. App. 7a. Like *Madsen*, the *Schenck* case involves an injunction, not an ordinance. On this basis, the City attempts to distinguish *Schenck* in advance of this Court's decision in that case. This is in line with the Ninth Circuit's decision below that erroneously dismissed this Court's invalidation of the "consent" provision as a mere result of the higher level of scrutiny applicable to injunctions but not applicable to ordinances. Pet. App. 7a, 9a-10a. Adopting this reasoning, the City argues that whatever this Court's ruling in *Schenck*, it will not decide "the question of the constitutionality of Section 23-10.1, the Phoenix 'Bubble' Ordinance." City Opposition Brief (hereinafter "Opp.") at 12. There is every reason to believe that the thirty-five cities that desire their own "bubble" ordinances will agree with this argument, just as they did as joint amici in the Ninth Circuit. Pet. App. 98a.

This consideration weighs strongly in favor of granting the Petition for Certiorari. Until this Court addresses the

constitutionality of "bubble" restrictions codified as *ordinances*, the lower courts will be free to disregard or distinguish the Court's injunction decisions.

II. THE DECISION OF THE NINTH CIRCUIT DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *MADSEN V. WOMEN'S HEALTH CENTER, INC.*[1]

If the Phoenix "bubble" provision were contained in an injunction, instead of an ordinance, it would clearly fail constitutional review under *Madsen*'s heightened level of scrutiny. Thus, the linchpin of the City's argument is the distinction between ordinances and injunctions, and their respective levels of scrutiny. Invoking the relatively lower level of scrutiny used for "generally applicable statutes," the City attempts to distinguish the "consent" provision invalidated in *Madsen*.

There is no dispute that, like the injunctive "consent" provision in *Madsen*, the "Bubble" Ordinance was imposed to prevent unwanted and offensive "anti-abortion" expression in the public fora near an abortion provider. CR 13, Ex. A at 1-2 (Planned Parenthood Aff.).[2] In *Madsen*, this Court stated, "If this were a content-neutral, *generally applicable* statute, instead of an injunctive order, its constitutionality would be assessed under the

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[1]The City does not dispute that the "Bubble" Ordinance restricts expression. Opp. at 5-6. Moreover, the City does little to defend the Ordinance against Petitioners' vagueness attack, arguing feebly that the restrictions struck down in *Madsen* were "more vague" than those at issue here. Opp. at 7 n.4.

[2]"CR" is the designation for the District Court Clerk's Record filed with the Ninth Circuit.

standard set forth in *Ward v. Rock Against Racism*, [491 U.S. 781 (1989)]." 114 S.Ct. at 2524 (emphasis added). The City latches onto this distinction and argues that *Madsen*, therefore, does not require invalidation of the Phoenix "bubble."

The City's reasoning is meritless for two reasons. First, the Ordinance is demonstrably unconstitutional even under the standard for "generally applicable" statutes. Second, the Ordinance is a content-based regulation of expression and therefore subject to the higher level of scrutiny.

A. Overbreadth

This Court explained in *Madsen* that injunctions and "generally applicable" ordinances are two very different regimes of speech regulation, having different advantages and presenting different dangers. See *Madsen*, 114 S.Ct. at 2524. The "Bubble" Ordinance, however, partakes the worst of both worlds. While the "Bubble" Ordinance, like an injunction, is limited in its application to defined "health care facilities," it is *not* limited in its speech restrictions to particular malefactors who have been responsible for disruption. It "enjoins" *all* law abiding persons, including those who wish to engage in peaceful and nonthreatening expression.

There is nothing in *Madsen* to suggest that the "consent" provision, like the "bubble" restriction here, would have passed muster had it been codified as an ordinance. Evaluated as "generally applicable" statutes, both the *Madsen* provision and the Phoenix "bubble" are unconstitutional because they "regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799. "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). The Phoenix

"bubble" claims its legitimacy as a means of protecting against "impeding" access and protecting against the "emotional effects of . . . harassing and intimidating activities." Pet. App. 56a. But the Ordinance goes drastically beyond this identified governmental interest by restricting peaceful and nonthreatening speech that does *not* impede and does *not* cause upsetting "emotional effects." Indeed, the "Bubble" Ordinance restricts speech even in the total *absence* of physical impediment, obstruction, threats, harassment, and emotional distress.

The City's opposition ignores the gross overbreadth of the Ordinance. Instead, it dismisses the overbreadth issue as a "few vaguely defined hypothetical cases." Opp. at 8.[3] It is revealing, however, that the City does *not* disagree that the Ordinance can be used in the manner described in the Petition. Further, the City itself agreed in the District Court that the Ordinance permits clinic "escorts" to censor the communications of counselors and leafletters attempting to communicate with willing recipients. CR 29 (Rptrs. Tr. at pp. 13-15).

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[3]The City observes that the "Petitioners do not cite any decision . . . in which a statute or ordinance like section 23-10.1 has been held to be insufficiently narrowly tailored." Opp. at 5. But the Eighth Circuit and the Supreme Court of North Dakota have invalidated analogous restrictions. See *infra* § IV. Further, two "bubble" ordinances have in fact been challenged on overbreadth grounds. Both were held unconstitutional by United States District Courts. A Santa Barbara "bubble" ordinance was held unconstitutional in *Edwards v. Santa Barbara*, 883 F.Supp. 1379 (C.D. Cal. 1995), Pet. App. 59a, vacated and remanded by the Ninth Circuit in light of its *Sabelko* decision. Pet. App. 96a. Similarly the District Court below held the Phoenix "Bubble" Ordinance unconstitutional on overbreadth grounds. *Sabelko v. City of Phoenix*, 846 F.Supp. 810 (D. Ariz. 1994). Pet. App. 22a.

Most significantly, the overbreadth of the Ordinance is contained in the language of the provision itself. For example, the Ordinance works a *total* ban on *all* unwanted speech within a "bubble."[4] It is axiomatic that "an absolute prohibition on speech" is unconstitutional. *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987); *United States v. Grace*, 461 U.S. 171, 181 (1983) ("total ban" on expression on a public sidewalk is unconstitutional). As noted above, under the Ordinance, a person within the "bubble" commits a crime even if he communicates to another person who wishes to receive the information.[5] Further, by extending the power to invoke the "bubble" to *all* persons, the Ordinance is substantially broader than the "consent" provision struck down in *Madsen*, which, by contrast, was specifically limited to "'person[s] seeking services of the clinic'." 114 S.Ct. at 2529. The *Madsen* "consent" provision was also limited to the *named* demonstrators in the injunctive order. *Id.* By contrast, the "Bubble" Ordinance "enjoins" all persons in the universe.

Adding to the overbreadth problems, the Ordinance operates at *any* "place used to provide . . . psychological, nursing

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[4]The "bubble" also can be increased to well beyond eight linear feet by raising an arm and extending a stick or pointer. See Ord. sec. 23-10.1 C (Pet. App. 58a).

[5]The City misstates and glosses the prohibitions of the "Bubble" Ordinance throughout its opposition brief. The Ordinance does not merely require a person to "move eight feet away from a person who makes a 'clearly communicated request' that they move away." Opp. at (i). It prohibits the utterance of all unwanted expression within the "bubble." Indeed, under the Ordinance, a person actually need *not* vacate the "bubble" if he discontinues all expression. See Ord. (Pet. App. 56a).

or [any] other health care services, including family planning counseling and pregnancy-related services." Ord. sec. 23-10.1 B 3 (Pet. App. 58a). The Ordinance thus restricts expression in the public fora near schools, many government buildings, and any business or factory where a "nurse" or "counselor" is present.

B. Content-Neutrality

Second, the Ordinance is content-based, and, therefore, subject to strict scrutiny. See *Madsen*, 114 S.Ct. at 2524; *Boos v. Barry*, 485 U.S. 312, 321 (1988) ("[A] content-based restriction . . . must be subjected to the most exacting scrutiny"); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 115-16 (1991) (Content-based regulations are "presumptively" invalid). The "Bubble" Ordinance was expressly enacted to protect persons from the "emotional effects" of "anti-abortion" expression. Pet. App. 56a. A regulation that restricts speech out of concern for its communicative impact is content-based. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *United States v. Eichman*, 496 U.S. 310, 317-18 (1990); *Texas v. Johnson*, 491 U.S. 397, 411-12 (1989); *Boos*, 485 U.S. at 321. Moreover, the prevention of "emotional effects" resulting from speech is an unconstitutional basis for restricting expression. See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982). Thus, the "Bubble" Ordinance is subject to the higher level of scrutiny.[6]

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[6]It is also highly doubtful that abortion facility "bubble" ordinances, like the Phoenix "bubble," should be considered statutes of *general* applicability for purposes of First Amendment analysis. The "Bubble" Ordinance does not restrict speech in the public fora near all buildings or businesses, but *only* those

(continued...)

III. THE CITY IGNORES THE UNCONTESTED RECORD BELOW, AND TURNS THE PUBLIC FORUM AND CAPTIVE AUDIENCE DOCTRINES ON THEIR HEADS.

The City argues that the Ordinance does not permit a "heckler's veto" because it leaves a speaker free to speak to any individual except the person "who has specifically requested them to move away." Opp. at 6. This is utterly false. The Ordinance empowers *any* person to order a speaker or leafletter to withdraw or discontinue his expression within the invoked "bubble" area. The Ordinance does not require that the intended recipient of the communication invoke the "bubble." Thus, the Ordinance enables a clinic "escort" or volunteer to prevent expression *even if the intended recipient wishes to receive it*. Obviously, it is one thing for a pregnant woman entering an abortion clinic to decide that she does not want to engage in discussion about alternatives to abortion; it is quite another thing for the State to silence the speaker on the basis of this desire. Worse yet, under the Phoenix Ordinance a clinic employee or volunteer can decide to stifle the speaker and prevent a possibly willing audience from receiving a communication.

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[6](...continued)
surrounding defined "health care facilities." Most significantly, it was conceded in the District Court that the actual target of the Ordinance is narrower still. The Ordinance is designed to restrict "anti-abortion" speech at abortion facilities. CR 13, Ex. A; CR 13 (Tr. of City Council Session). The fact that the Ordinance was expressly enacted for an abortion provider to restrict "anti-abortion" expression on nearby sidewalks triggers the same constitutional concerns that require heightened scrutiny of injunctions. See *Madsen*, 114 S.Ct. at 2524-25.

In fact, the City expressly *agreed* in the District Court that the "Bubble" Ordinance could be used in just this way. CR 29 (Rptrs. Tr. at pp. 13-15). Similarly, the Phoenix City Council was expressly informed during the legislative process that the Ordinance permitted abortion clinic personnel to censor the communications of sidewalk leafletters intended for persons accessing the clinic. CR 33 (testimony of Rev. Costantino and S. Riely). The Ninth Circuit's divided panel also recognized that the language of the Ordinance permitted such usage. Pet. App. 9a; and see Pet. App. 17a (Beezer, J., dissenting).

The City is equally incorrect in its argument that this Court's precedents permit a person to exercise a personal "audience veto" on speech he does not wish to hear or see. Opp. at 6. On the contrary, in a traditional public forum, such as a public sidewalk, the Court has made clear that persons are expected to avoid the unwanted message by simply walking away or averting their eyes. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209-11 (1975). Indeed, this rule applies even in some *nonpublic* fora, such as a courthouse. *Cohen v. California*, 403 U.S. 15, 21-29 (1971). As the Court stated in *Madsen*, addressing the "consent" provision, in the public forum "citizens must tolerate insulting and even outrageous speech." 114 S.Ct. at 2529. Thus, the City's argument, adopted by the divided Ninth Circuit panel, is demonstrably erroneous under the unbroken precedents of this Court. See, e.g., *Forsyth County, Ga.*, 505 U.S. at 134; *Eichman*, 496 U.S. at 317-18; *Johnson*, 491 U.S. at 411-12; *Boos*, 485 U.S. at 321. Requiring *the demonstrator to shut up or retreat*, as does the "Bubble" Ordinance, stands public forum doctrine on its head. See *Frisby*, 487 U.S. at 484 (except for the home, "we expect individuals simply to avoid speech they do not want to hear"); *Erznoznik*, 422 U.S. at 211 ("the burden falls upon the viewer [offended by the visual display] to avoid further bombardment of

his sensibilities simply by averting his eyes"); *Cohen*, 403 U.S. at 21 (same).

In *Madsen*, this Court observed that even if the government's intent is to protect persons from being "stalked" or "shadowed," a restriction placing the burden on a nonthreatening speaker to retreat is unconstitutional. 114 S.Ct. at 2529. "Absent evidence that the protesters' speech is independently proscribable (i.e., 'fighting words' or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, [the] provision [requiring the protestor to stop the expression or retreat] cannot stand." *Id.* at 2529.

The City chiefly relies on two cases, claiming, incorrectly, that they support a broad right of persons to censor unwanted expression in the public forum. Both decisions, however, were limited to the privacy of the home. *Frisby*, 487 U.S. at 483; *Rowan v. United States Post Office Dept.*, 397 U.S. 728 (1970).

IV. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE EIGHTH CIRCUIT AND THE NORTH DAKOTA SUPREME COURT.

The City attempts to gloss the conflict between the Ninth Circuit's decision below and the decisions of the Eighth Circuit in *United Food and Commercial Workers Int'l Union v. IBP*, 857 F.2d 422 (8th Cir. 1988), and the North Dakota Supreme Court in *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 488 N.W.2d 401 (N.D. 1992). Both decisions held similar restrictions on unwanted speech to be unconstitutional. The *IBP* case, like the present case, dealt with a statute. Like *Madsen* and *Schenck*, the *Lamb's of Christ* decision dealt with a similar restriction imposed by an injunction. The City's hair-splitting attempt to distinguish these cases only serves to underscore the need for this Court to

review the decision below and sort out the constitutional confusion in the lower courts.

CONCLUSION

This Court should grant the Petition for Certiorari.

Respectfully submitted,

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